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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 113

MANDASK COMPANIA DE VAPORES, S.A.,
Petitioner,

against

FEDERAZIONE ITALIANA DEI CONSORZI AGRARI, *et al.,*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Mandask Compania De Vapores, S.A., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on January 16, 1968.

Opinions Below

This case has been twice tried and twice appealed. The opinion of the United States District Court for the Southern District of New York in the first trial, denying exoneration but granting to petitioner limitation of liability is reported at 223 F.Supp. 206 (S.D.N.Y. 1964), at 1965 A.M.C. 928 and is reprinted in the appendix filed herewith (A1-A15; R. 1668-1687).

On appeal to the United States Court of Appeals for the Second Circuit, the Court of Appeals reversed the District Court, expressing the view that the petitioner should have been exonerated. The opinion of the Court of Appeals is reported at 342 F.2d 215 (2d Cir. 1965), at 1965 A.M.C. 921, and is reprinted in the appendix filed herewith (A16-A20; R. 1694-1697). Since the trial judge in the District Court (Honorable Archie O. Dawson) had died before this appeal was decided the Court of Appeals remanded the case to the District Court for re-trial.

On a second trial before the United States District Court for the Southern District of New York, the District Court held that petitioner was not entitled to exoneration from or limitation of liability. This second opinion of the District Court is unreported but is reprinted in the appendix filed herewith (A20-A38).

On a second appeal to the Court of Appeals for the Second Circuit this second opinion of the District Court was affirmed by the Court of Appeals, by a different panel than heard and decided the first appeal. The opinion of the Court of Appeals on the second appeal is reported at 388 F.2d 434 (2d Cir. 1968) and is reprinted in the appendix filed herewith (A40-A49; R. 1784-1795). A petition for rehearing was denied by the Court of Appeals in an opinion which is unreported but is reprinted in the appendix hereto (A50; R. 1833).

Jurisdiction

The second judgment of the United States Court of Appeals for the Second Circuit was entered on January 16, 1968 (A40-A49; R. 1784-1795). The petitioner filed a timely petition for rehearing, which was denied by the Court of Appeals on February 20, 1968 (A50; R. 1833). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

The statutory provisions involved on this petition are:

1. The Fire Statute (R.S. § 4282, 46 U.S.C. 182):

> "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

2. The Limitation of Liability Act (R.S. § 4283, 46 U.S.C. 183(a)):

> "(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

3. The Carriage of Goods by Sea Act (COGSA), (49 Stat. 1210, 46 U.S.C. 1304 (1), (2) (b) (p) (q)):

> "(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or dam-

age has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

UNCONTROLLABLE CAUSES OF LOSS

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * *

"(b) Fire, unless caused by the actual fault or privity of the carrier;

* * *

"(p) Latent defects not discoverable by due diligence; and

"(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

Questions Presented

In meeting the test of due diligence to make a vessel seaworthy under COGSA is a vessel owner not to be entitled to rely upon the fact that immediately prior to the disaster in suit the vessel received extensive repairs, made at considerable cost, by a reputable shipyard, pursuant to the recommendations of, and with the supervision and approval of the American Bureau of Shipping, and which resulted in granting highest classification to the vessel?

In fixing the standard of due diligence to be applied in cases under COGSA should the Court of Appeals be

permitted to reject the testimony of experts of a world renowned classification society in favor of its own expertise, where prior decisions of the same court, of the courts of other circuits, and the courts of England, have upheld the right of the vessel owner to rely upon compliance with the requirements of the classification society?

Where, on two trials and appeals therefrom, the eight sitting judges are evenly divided on the question as to what constitutes the standard of due diligence to be applied in cases under the COGSA and the second and final decision of the Court of Appeals is in conflict with its own prior decisions, the decisions of other circuits, and the decisions of the English courts, should not the decision of the Court of Appeals be reviewed by this Court in the interest of establishing uniformity in the applicable law?

In construing the standard of due diligence to be applied to a foreign flag vessel under COGSA, shall the Court of Appeals, in denying to an owner the right to rely upon compliance with classification society requirements, require that the vessel owner must also meet United States Coast Guard requirements, notwithstanding the flag of the vessel?

Where the decision of the District Court that the vessel owner was lacking in due diligence to make the vessel seaworthy is predicated upon an erroneous, unsupported finding that the vessel was "presumably" built of brittle steel, may the Court of Appeals, nevertheless, be permitted to affirm by dismissing objection to this unsupported finding upon the ground, in substance, that the District Court did not mean what it said?

Should this Court permit to stand a decision of the Court of Appeals which, in rejecting compliance with classification society requirements as meeting the test of due diligence would effectually negate the exemptions of COGSA and the Limitation of Liability Act and impose upon the vessel owner an insurer's liability?

Statement of the Case

These proceedings arise out of the loss of the *Perama*, a tank vessel of Panamanian registry, following upon a fire and explosions which occurred while the vessel lay to in the Gulf of Mexico, on March 18, 1957.

The *Perama* had been purchased by the petitioner in late 1956, after having been laid up by her previous owners for more than a year (R. 489-490). The vessel had been built in 1936 as a riveted vessel (A 49). Prior to purchase, petitioner requested the American Bureau of Shipping, with which the vessel had been classed, to make a thorough inspection to determine whether the vessel could be placed in a condition to be accepted for classification (R. 490, 598, 1029-1034). Following extensive surveys and inspections, petitioner was advised by the American Bureau of Shipping that the vessel could be classed if its recommendations were followed (R. 493-494). American Bureau of Shipping personnel drew up the specifications and plans for the repairs recommended by it, made daily inspections of the repairs as they progressed, and tested, approved and certified the *Perama* as seaworthy and fit to retain her class for the next four years, upon completion of the repairs in mid-January, 1957 (R. 494-496, 514-517). The repairs cost almost $1,000,000 and required 2½ months to be completed by the reputable Alabama Drydock and Shipbuilding Company (Plaintiff's Ex. 58).

The *Perama* then made one loaded transatlantic winter voyage to England and returned to Todd Shipyard at New Orleans for minor voyage repairs (R. 180-182, Plaintiff's Ex. 2). She then loaded the soybean oil cargo here involved at Baton Rouge (A 41). Respondents' surveyors made detailed examinations of the *Perama's* hull before and after the voyage repairs and loading, and approved her for the intended voyage (R. 53-54, 727-729, 743).

The *Perama* departed Baton Rouge on March 15, 1957 and about 0130 on March 18, 1957 lay to in the calm waters of the Gulf of Mexico, with temperature of 71°F., while repairs to one of the vessel's pumps were being made in the engine room (A 41). At that time fire broke out in the after cofferdam and pump room. The fire persisted until there occurred at 0315 an explosion which violently shook the stern section of the vessel (R. 263-265). Coincident with the explosion, a number of breaches occurred in the ship's bulkheads in and around the vicinity of the port fuel tank, where the explosion apparently occurred (A 41-A 42). Breaches were seen in the bulkheads of the fuel tank, in the sides of the ship below the waterline in the engine room, in the forward bulkhead of the engine room, and in the hull and after bulkhead in the pump room (R. 275-276, 293-299, 314-315). Oil and water poured violently through these breaches and from the ship's bottom, to such an extent that all engine room pumps, working at full speed, could not control the constantly rising water which soon rendered the pumps inoperative (R. 316-319, 277-279). A cargo pipe in the cofferdam was also fractured by the explosion (R. 430-434). 25 minutes after the explosion the engine room auxiliaries were submerged and the *Perama* was without electricity (R. 264). Within less than 2 hours after the explosion, the Perama's freeboard aft decreased from 7 feet to only 1 foot (R. 165). 13 hours afterward she sank, stern first and intact, while an attempt was made to tow her (R. 265).

On July 19, 1957, the owners of the soybean cargo on board the *Perama* at the time of her sinking, respondents herein, brought suit against petitioner in the United States District Court for the Southern District of New York to recover the value of said cargo.

Petitioner pleaded in defense to the said action that the loss was caused by the fires and resulting explosions, that

it had exercised due diligence to make the vessel seaworthy and was therefore entitled to exoneration under the Fire Statute and the Carriage of Goods by Sea Act or, alternatively, to limitation of liability under the Limitation of Liability Act.

The action came on for trial in the District Court before The Honorable the late Archie O. Dawson. The trial resulted in an opinion by Judge Dawson, entered on June 11, 1964 holding that petitioner was liable for loss of the cargo, but was entitled to limitation of liability.

On appeal to the Court of Appeals it reversed the decision of Judge Dawson and remanded the case for a new trial, Judge Dawson having died in the interim. In remanding the case the Court of Appeals stated (A 19):

> "In his discussion of limitation of liability Judge Dawson said:
>
> > 'The loss of the cargo does not seem to have been a matter which was occasioned by a default of the owner or by a lack of care for which it may personally be charged.'
>
> It is difficult to explain how Judge Dawson could have reached this conclusion and yet held the owner liable for the loss, unless he adopted the erroneous view that the owner was, apart from the fire exception, an insurer of the ship's safety and unable to defend on the ground of due diligence."
>
> • • • •
>
> "It is clear that Judge Dawson, preoccupied with the issue of fire, overlooked the fact that due diligence was an available defense to the charge of unseaworthiness. Thus he committed the error of finding that there was liability on the owner for the loss of the cargo and, at the same time, that the owner was entitled to limitation of liability by reason of due diligence of a character which, it would appear, constituted a complete defense on the issue of liability."

> "We perceive no way of correcting the errors and of resolving the inconsistencies except by remand for a new trial."

A second trial was had before The Honorable Thomas F. Croake, who, in an opinion filed December 21, 1966, held that petitioner was liable and was not entitled to limitation. He concluded that petitioner had not met the test of due diligence in relying upon compliance with classification society requirements. His conclusion was predicated entirely upon the finding that the *Perama's* hull was one . . .

> ". . . whose pre-war plating was presumably of pre-war sensitivity and susceptibility to brittle fracture . . ." (A 31).

He therefore concluded that the vessel sank because of fractures in her brittle steel (A 31), resulting from the welding of new steel plates to the brittle steel in the vessel's original plating; that the vessel was therefore unseaworthy and that petitioner had failed to use due diligence in not testing for susceptibility to brittle fractures before the plate replacements were made (A 30-31-33-45-46). Further, Judge Croake held that petitioner was not entitled to limit its liability because it was privy to the cause of the sinking, through the presence on board the vessel during the reactivation repairs of two independent surveyors employed by petitioner, and occasional visits by its president (A 33).

In actual fact there was no evidence in the record that there was brittle steel in the *Perama's* hull plating; that finding was entirely a presumption by the trial judge.

The Court of Appeals, in affirming Judge Croake's decision, avoided Judge Croake's clearly erroneous finding by saying, in substance, that he really didn't mean what he said (A 45-46) and that anyway brittle steel was not an important point in the case (A 45-46)—this notwithstanding the fact that the finding of unseaworthiness rested upon welding to presumptively brittle steel. The Court of Ap-

peals went further to say that this method of welding new plates to brittle steel was "dangerous" (A. 48), and that in the exercise of due diligence petitioner should have tested the *Perama's* original plating to ascertain whether it was brittle.

Thus, the decision of Judge Croake, and of the Court of Appeals, rested upon an erroneous finding, for which there was no supporting evidence, *i.e.* that the *Perama's* hull plating was brittle steel, which resulted in fractures that caused the vessel to sink.

In holding that petitioner was not entitled to rely upon compliance with the classification society's requirements the Court of Appeals stated that to meet the test of due diligence the reactivation repairs should have complied with United States Coast Guard requirements.

A petition to the Court of Appeals for rehearing having been denied, this petition for a writ of certiorari ensued.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in conflict with its prior decisions, the decisions of other circuits, and the decisions of the English courts.

The decision below ruled that *Perama's* owner failed to exercise "due diligence" to make her seaworthy within the meaning of COGSA [1] (A 40-A 49). The court reasoned that the vessel was unseaworthy due to improper repairs and the owner was liable, although the repair yard was a highly reputable one and repairs were conducted strictly in accordance with the recommendations and directions, and under the supervision of the American Bureau of Shipping (A 40-A 49). The court thus ruled that a vessel owner cannot satisfy the "due diligence" requirements

[1] 46 U.S.C.A. §1304(1).

of COGSA by relying upon the expertise of the American Bureau of Shipping, and complying with their recommendations and instructions. The standard of technical knowledge and expertise imposed on the shipowner by this decision is greater than any heretofore known. Such a determination is in direct conflict with the decisions of other panels in the same circuit, as well as other circuits, and the highest court in Great Britain.

The decision of the Court of Appeals is in direct contradiction to the decision of the same court, although by a different panel, in *Peter Paul Inc.* v. *Rederi, A/B Pulp*[2], a case that is on all fours with the present case, and in which it was held that a vessel owner has met the test of due diligence in relying upon the expertise of the vessel's classification society. In *Peter Paul* the vessel *Christer Salen* broke in two, allegedly because of a brittle fracture, and the failure to be equipped with "crack arresters" (the very same fault ascribed to *Perama* in this case). The cargo interests in the *Peter Paul* case (as the respondents in this case) claimed that the vessel owner could not delegate its authority or duty to exercise due diligence, and that it could not rely upon the recommendations and opinions of the vessel's classification society, in that case Lloyds. Judge McGohey held that the owner could rely upon Lloyds' recommendations against installing crack arresters and was entitled to exoneration:[3]

> "*The libellants further contend that since the shipowner may not delegate its duty to exercise due diligence, the reliance on Lloyds is not enough to exempt it from liability.* The argument is that since the owner itself knew or is charged with knowing all of the data gathered in the United States, in light of that data, Lloyd's views to the contrary notwith-

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[2] 258 F.2d 901 (2nd Cir. 1958).

[3] *Peter Paul Inc.* v. *M. S. Christer Salen*, 152 F. Supp. 410, 416 (S.D.N.Y. 1957).

> standing, the owner in the exercise of due diligence should have ordered the installation of crack arresters when the vessel was being repaired in 1950. *This argument seems to me to read 'due diligence' out of the statute.* In view of the sharp difference of opinion between Lloyd's experts and some, though not all, American experts, *I think common prudence dictated that the owner rely on the judgment of those experts under whose supervision its vessel had been built and repaired and who regularly surveyed and passed it for classification* as a seaworthy vessel. * * *." (Emphasis ours)

The Court of Appeals, affirming Judge McGohey's views, stated:

> "Appellant's argument therefore comes down to the following propositions: that any owner of an all-welded ship who did not definitely know that his ship was not notch brittle was required at the earliest feasible time to outfit her with crack arresters. We think such a rule imposes too broad a standard of liability."[4]

It is significant that although the decision in *Peter Paul* was briefed and argued to the Court of Appeals in the present case the court has simply ignored that decision in its opinion in the present case and makes no mention of it whatever.

Other 2nd Circuit decisions exonerating vessel owners who relied upon the expertise of their vessels' classification societies are: *The Floridian,* 83 F. 2d 949, 951 (2nd Cir. 1936); *The Zarembo,* 44 F. Supp. 915, 917 (E.D. N.Y. 1942), aff'd (*sub nomine Balfour Guthrie & Co.* v. *American West African Line,* 136 F. 2d 320 (2d Cir. 1943)).

The Fourth Circuit likewise exonerated a vessel owner, in *Hampton Roads Carriers, Inc.* v. *Allied Chemical Corp.,*[5]

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[4] 258 F.2d 901, 905.

[5] 329 F.2d 387, 390-392 (4th Cir. 1964).

and ruled that the owner had exercised due diligence to make the vessel seaworthy when the vessel sank within 60 days after two surveys had been conducted on the vessel. One of the surveys disclosed fractures in the hull which were repaired at the surveyors' direction.

The Fifth Circuit, in *The Point Chico*,[6] held that a vessel owner had exercised "due diligence" to make his vessel seaworthy and was entitled to exoneration in a cargo damage suit, where the vessel owner relied upon the expertise of his vessel's classification society and its surveyor's approval of a chain locker, even though other experts contended that cargo damage could have been avoided if the chain locker had had a different drainage system.

This Court has often stressed the desirability of uniformity of interpretation of the same or similar documents and statutes regarding maritime matters in the courts of this country and the courts of England. Justice Frankfurter stated in *Mitchell* v. *Trawler Racer, Inc.*,[7] that considerations urging harmony of law for international carriage, especially between the United States and the United Kingdom, led to the enactment of COGSA.

The law in England is expressed in the recent decision of the House of Lords in *Union of India* v. *N.V. Reederij Amsterdam*,[8] wherein it was held that a vessel has met the test of due diligence in relying upon the recommendations of his classification society, in this instance Lloyds. In *Union of India*, the *Amstelslot* left Portland, Oregon with a cargo of wheat for India, shipped under a bill of lading incorporating the United States COGSA. Her reduction gear broke down 900 miles from Honolulu due to a crack, necessitating considerable delay and expense. Cargo

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[6] 122 F.2d 1, 3 (5th Cir. 1941).

[7] 362 U.S. 539, 559 (1960).

[8] [1963] Vol. 2 Lloyd's List Law Reports 223.

charged that the shipowner failed to exercise due diligence to make the ship seaworthy, as required by Section 3(1) of COGSA, the same claim that is made herein. The review, discussion and conclusions of the House of Lords are in marked contrast to the conclusions of the Court of Appeals in the present case.

The *Amstelslot* had been built under Lloyd's supervision in 1922 and remained classed with Lloyd's until the casualty then befell her in 1957. In 1956 she was turned over to the present owners and put through a two month overhaul during which her machinery was surveyed by a Lloyd's surveyor (p. 225) and by the owner's chief engineer superintendent (p. 233). Allegedly, during the 1933 installation of the reduction gear, certain parts were fitted too tightly, resulting in fatigue and fracture of the metal.

The House of Lords stated the issues to be whether, if the crack so occurred, this condition should have been observed during a proper inspection in 1956; and, if the crack did not so occur, whether it still should have been observed by a proper inspection in 1956 (pp. 225-226).

Both parties' contentions therein were essentially those raised regarding the *Perama's* Alabama repairs (pp. 226-227). Cargo had claimed that a number of extra precautions should have been taken to discover, or to have a better chance of discovering the crack (pp. 230, 231, 233, 235). Cargo relied, as respondents do in the *Perama*, upon expert witnesses who criticized the survey as being inadequate (p. 235).

The House of Lords held that it was not enough to say that taking those steps would have given a better chance of discovering the cracks (pp. 230, 232, 235). The question was whether the examination was of the type that a *prudent* owner should reasonably have made, and if the examination was carried out with *reasonable* skill, care and competence (pp. 230, 231, 234).

The further steps demanded by cargo would have taken considerable time and effort and *would have required a higher standard than the due diligence shown by the above facts to have been exercised by the owner* (pp. 232, 230, 235).

It would be impractical to make elaborate scientific tests for every defect which could possibly be present in everything covered by a survey (pp. 230-231, 235). There was no lack of care or skilled knowledge; the surveyors knew the methods available.

> "* * * What is said against them is that by deciding in effect that these methods were not appropriate to the sort of examination they were conducting, they made an error of judgment which a competent surveyor ought not to have made. Lack of due diligence is negligence; and what is in issue in this case is whether there was an error of judgment that amounted to professional negligence." (p. 235)

The House of Lords held that the owner was justified in relying upon its classification society's surveys and recommendations, and had exercised due diligence warranting exoneration within the meaning of COGSA. But in the present case petitioner, who acted upon the same reliance as did the owner in Union of India, has nevertheless been charged by the Court of Appeals with making "dangerous" repairs. If this decision stands, the desired uniformity in the interpretation of these important COGSA points between this country and England will be eliminated.

The decisions in other circuits cited by the Court of Appeals to support its conclusions regarding due diligence bear little relation to the *Perama* situation. For example, *Ionian Steamship Co. of Athens* v. *United Distillers*[9] is clearly distinguishable on its facts. The decision there rested upon the ground that the vessel was seriously overloaded.

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[9] 236 F.2d 78, 83-84 (5th Cir. 1956).

W. R. Grace & Co. v. *Charleston Lighterage & Transfer Co.*,[10] cited by the Court of Appeals (A 49) as authority for the proposition that petitioner had knowledge and privity as a matter of law is also factually distinguishable. In that case a wooden lighter loaded with cotton sank while under tow. No repairs had been made since the lighter was purchased three years before the sinking, and there was no proper inspection or upkeep. After the sinking a crack was discovered in the hull which was found to be soft and beginning to rot (pp. 542-543).

The Court of Appeals completely misconstrued (A 49) the Ninth Circuit's discussion of brittle fractures in *States Steamship Company* v. *United States*,[11] which supports petitioner's claims of due diligence. In that case, the *Pennsylvania*, an all-welded ship, built during World War II, sank with all hands in January in the Gulf of Alaska after radioing that she had suffered a fourteen foot side crack (pp. 459-460). The Court stated that the highest incidence of fractures occurs when the combination of low temperatures and heavy seas prevails. She had sustained a twenty-two foot deck crack on the preceding voyage due to the crack sensitiveness of the vessel in extremely cold weather. Because of this former crack, the vessel was shown to be crack sensitive which made her unseaworthy under conditions of extreme cold weather (p. 466). Despite this known propensity to fracture under such conditions, the *Pennsylvania* was sent on this mid-Winter North Pacific voyage where low temperatures, heavy seas, and unusual stresses would be encountered. The prior experience and resulting implications were within the knowledge of managerial employees (pp. 464-468). The vessel was held unseaworthy because of her known crack sensitive-

[10] 193 F.2d 539 (4th Cir. 1952).

[11] 259 F.2d 458 (9th Cir. 1957-58).

ness (pp. 473, 475). The Ninth Circuit, held that, under the circumstances, the owner had the obligation

> "* * * to direct that the ship be taken to her destination in Japan by a route through warmer waters where the likelihood of severe storms would have been less." (p. 468)

No liability would have attached and the owner would have exercised due diligence had it so directed the vessel on a route through warmer waters where the likelihood of storms would have been less.

The *Perama* had none of these normal requisites for initiating a single brittle fracture. She was not a welded vessel, did not have brittle steel, did not encounter heavy seas, and was not underway at the time of the casualty, which occurred in the calm, warm waters of the Gulf of Mexico (R. 1234, 1238-1242, A 41).

If the present decision is permitted to stand, the due diligence defence available to a vessel owner under COGSA is effectively eliminated and the uniformity of interpretation hitherto present in the various circuits of this country, and between this country and Great Britain is disrupted.

2. When eight judges are evenly divided on an issue that has gone through two trials and two appeals, the final decision of the Court of Appeals, in conflict with existing law should be reviewed in order to eliminate uncertainty in the law.

The *Perama* had been built to American Bureau of Shipping specifications, and had been classed with the Bureau at all times. The American Bureau of Shipping inspected the *Perama* before, during and after the repairs in question in this suit (R. 490, 494-496, 519-517, 598, 1029-1034). Specifications for the repairs drawn up by ABS involved the evaluation of the entire hull with all its com-

ponents and the making of any recommendations necessary to bring it up to ABS standards (R. 1370-1372). It was undenied that *Perama's* owner accepted, and complied with each and every recommendation (R. 495-499). ABS representatives were present during the entire repair period and all work done was examined and tested in accordance with ABS rules and found in seaworthy and satisfactory condition (R. 494-496, 514-517).

Eight judges have now considered these facts in the course of two trials and two appeals, and have split evenly on the issue of whether or not *Perama's* owner exercised "due diligence" to make her seaworthy. The first trial court found that recognized experts had been selected by the Owner to plan, supervise and carry out her repairs and refused to hold that the owner had failed to exercise due diligence with regard to seaworthiness (A 13-15) and stated:

> "* * *. While undoubtedly the Respondent as owner of the vessel, knew about the welding and approved it, *there was no proof that the loss of the vessel's cargo was done or occasioned by some default of which the owner was in privity for this would imply that the Respondent knew that such welding made the ship unseaworthy.* The rehabilitation of the vessel was done for Respondent at the Alabama Drydock & Shipbuilding Company where she underwent intensive survey by representatives of the American Bureau of Shipping to determine the repairs necessary to put the vessel back in class with the American Bureau of Shipping. The reconditioning and repairs cost in excess of $890,000.00. The repairs were supervised by an independent surveyor acting for the Respondent; by representatives of the American Bureau of Shipping and by the representative of Alabama Drydock & Shipbuilding Company. Following completion of the work the PERAMA was accepted in class as being seaworthy by the American Bureau of Shipping."
>
> * * *

> "In retrospect it would seem that the reconstruction of the vessel by welding of the new plates was a mistake. However, it was approved by recognized experts in the shipping industry at the time. *The loss of the cargo does not seem to have been a matter which was occasioned by a default of the owner or by a lack of care for which it may personally be charged.* There seems to be no reason why it should be unable to avail itself of the limitation of liability provided by Section 183. * * *." (pp. A 13-A 14) (Emphasis ours)

District Judge Dawson concluded that this entitled the Owner to Limitation of Liability.

An experienced admiralty appellate panel, consisting of Judges Lumbard, Waterman and Hays, determined that, based upon Judge Dawson's findings and conclusions, the petitioner should have been exonerated, as petitioner contended, rather than having been granted limitation of liability. However, since Judge Dawson was not then alive to correct his apparent error, the Court of Appeals remanded the matter for a new trial (A 19-A 20).

Judge Croake, who sat for the second trial, did not have the benefit of personally hearing any of the fact witnesses, but nevertheless, and in contradiction of Judge Dawson, found that the owner had failed to exercise due diligence and was entitled to neither exoneration nor limitation of liability (A 36-A 39). Judge Croake concluded that

> "* * * The owner has not shown that the repairs themselves were performed with the kind of diligence that would exonerate it from liability for the ensuing unseaworthiness. * * *" (A 33)

He did not explain what kind of diligence would warrant exoneration.

A second Court of Appeals panel, consisting of Judges Friendly, Kaufman and Anderson, affirmed Judge Croake's

opinion. The Court recognized that petitioner claimed to have exercised the due diligence required by COGSA to justify exoneration, and that

> "* * * it produced evidence to show that it had fully complied with the recommendations of the American Bureau of Shipping to make the vessel seaworthy and that it contracted to have the work done by a reputable shipyard, Alabama Shipyard & Dry Dock Company. * * *" (A 47)

It admitted that

> "There was evidence that the American Bureau of Shipping in its standards approves and accepts unlimited replacements of the plates in a riveted hull by welded plates. * * *" (A 48)

Although the undisputed evidence in the case showed that the repairs to the *Perama* fully complied with ABS standards the Court of Appeals nevertheless concluded:

> "* * * That this method of repair used so extensively in the *Perama* was dangerous was something the appellant knew or should have known." (A 48)

As noted above, *supra* (pp. 10-18), the last two decisions in this case are in plain conflict with the decisions of other panels in the same circuit, as well as being in conflict with the decisions of courts in other circuits as well as the highest court in England.

The confused state of the law resulting from the present decisions of the Court of Appeals with respect to the standard of "due diligence" imposed upon ship owners will wreak havoc not only on the shipping industry, but also upon marine insurers and shipbuilders. This is a matter of continuing legal and commercial importance, and certain to give rise to widespread litigation until the present decision as to what does constitute the standard of due diligence under COGSA is resolved by this Court.

3. There is no justification in law or in commercial practice for the ruling of the Circuit Court that a foreign vessel owner is not entitled to rely upon compliance with classification society requirements but must also comply with United States Coast Guard requirements.

In this case, the Court of Appeals based its conclusion that *Perama's* owner had not exercised "due diligence" to make her seaworthy, on the erroneous assumption that the United States Coast Guard would not have approved the repairs made on *Perama*. There was no evidence before the Court of any such Coast Guard regulation applying its requirements to foreign flag vessels such as the *Perama*. Until the present case no decisions of our Court have gone so far as to say that the standard of due diligence requires not only compliance with classification society requirements, but also with United States Coast Guard requirements. Moreover, assuming *arguendo* that the Coast Guard had such regulations, there is no basis in existing law to hold that such a regulation can be extended unilaterally to a foreign flag vessel, which, in such matters as this, is beyond the regulatory control of the United States Coast Guard.

4. The Court of Appeals was not warranted in affirming the District Court decision as to lack of due diligence which was predicated upon a clearly erroneous and unsupported finding that the vessel was constructed of brittle steel.

This Court, in *McAllister* v. *United States*,[12] stated that in reviewing the judgment of a trial court sitting without a jury in admiralty a court of appeals may not set aside the judgment below unless it is clearly erroneous,

[12] 348 U.S. 19, 20 (1954).

as under Rule 52(a) of the Federal Rules of Civil Procedure. In defining the Rule 52(a) standard, it stated:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

This Court obviously did not intend to remove all fact finding considerations from the courts of appeal, particularly where, as here, clear factual errors require and demand appellate review. The *McAllister* rule should be applied impartially. However, in this case, the Court of Appeals refused to look beyond Judge Croake's findings, and in effect extended the *McAllister* rule to eliminate reversal even when the lower court is in clear error.

Judge Croake's entire opinion was based upon the finding that the *Perama's* hull was one

> "* * * whose pre-war plating was *presumably* of pre-war sensitivity and susceptibility to brittle fracture * * *." (A-31).

He stressed the fact that she sank because of fractures in her brittle steel (A31), and found her unseaworthy because they must have been triggered by the Alabama repairs (A30-A31). Both Judge Croake and the Court of Appeals concluded that the *Perama's* original plating should have been tested for susceptibility to brittle fracture before the plate replacements were made (A30-A31, A33, A45, A46).

The evidence in this case was that the steel used in vessels prior to World War II was of the high manganese content required after the war to eliminate the rash of brittle failures due to the low manganese content steel used during World War II in vessel construction (R. 1238-1242). There was no basis whatsoever for the conclusion that ABS or Alabama should have been required to test the *Perama's* original steel for brittle sensitivity.

Both parties' experts agreed that, even had the *Perama's* original plating been of the low manganese, brittle-sensitive type, brittle fractures are not associated with the warm temperatures found in the pump room and engine of a vessel in the Gulf of Mexico (R. 1257, 1502-1503). This testimony was ignored as was the finding in *Peter Paul, supra,* based upon almost identical testimony by the same government expert, MacCutcheon, that even brittle steel of proven high carbon, low manganese content did not become notch brittle until the temperature dropped to 30°F. The temperature was 71° when the *Perama* casualty occurred.

The only precaution advocated in welded vessels known to be built of brittle steel was the installation of crack arrestors, to prevent the spreading of minor fractures. The riveted *Perama* was constructed of crack arrestors and each of her new steel strakes was admittedly a crack arrestor (R. 1309). Even had the *Perama* been built of proven brittle steel, what further steps would this Court require? Replacing of all her original steel? This Court has as yet set no such standard. The Court of Appeals' decision left the owners' responsibility in such a case to the imagination. Neither owners, builders, repairers, nor their underwriters can operate on a sound business basis under such circumstances.

Such reasoning indicated a clear misconception of the basic controversy before the Court of Appeals, for if the steel were not actually brittle, there was no basis whatever for petitioner's alleged lack of diligence. Its decision ignored this vital point and created a new theory of liability. The "*essence*" of Judge Croake's decision is said to be that replacement of plates by welding in the *Perama's* riveted hull

> "* * *, set up stresses within the hull between the fixed and rigid areas of welded plates and the less rigid riveted areas which resulted in cracking in

> various parts of the hull and the internal structures. Just when and where such stresses in the hull will produce cracks—whether near to or distant from the place of repair—cannot usually be determined, but the substitution of large areas in a riveted hull with welded plates is likely to cause cracks. * * *." (A 46)

Since his opinion contained no such theory or explanation, the Court of Appeals claimed that he

> "* * * in effect, found that this is what happened in the present case * * *." (A 46)

The evidence of what was observed, and the expert opinion, did not support this conclusion, as claimed (A46). Although both parties' naval architects testified that there was no connection between the extensive fractures seen in the *Perama's* pump and engine rooms coincident with the explosion and the Alabama repairs (R. 1476, 1434, 1480, 1482, 1498-1501), the Court of Appeals termed the method of repairing "dangerous" (A 48).

The requirement that petitioners had to test the *Perama's* original plates and prove the steel non-brittle was condemned by the same court in *Peter Paul, supra.*

The House of Lords expressed the same opinion in *Union of India, supra,* page 13.

5. In rejecting the right of the vessel owner to rely upon the classification society requirements in meeting the test of due diligence, the Court of Appeals has effectively negated the statutory exemption of COGSA and the Limitation of Liability Act and forced upon the vessel owner an insurer's liability.

The mere fact that a vessel is unseaworthy does not *ipso facto* make her owner liable for resulting cargo dam-

age. *Craig* v. *Continental Insurance Co.*[13]; *Coryell* v. *Phipps.*[14]

In the instant case, *Perama's* owner relied upon the judgment and expertise of those experts under whose supervision *Perama* had been built and repaired, and who passed her for classification as a seaworthy vessel (*supra*, pp. 6-7). The Court below, nevertheless, held that this was insufficient to satisfy the standard of "due diligence" under COGSA.

If a vessel owner who relies upon the recommendations, standards and work of his classification society cannot obtain exoneration, the defense of due diligence has been effectively eliminated from COGSA by this decision of the Court of Appeals. If petitioner could not rely upon ABS opinions that the *Perama's* plate replacements should be by welding, what other opinion could a diligent owner rely upon? The absence of any indicated alternative upon which an owner may rely places upon him an impossible burden of proving due diligence and a virtual denial of the statutory exemption.

In the present case the Court of Appeals, contrary to its own prior decisions upholding the right of the vessel owner to rely upon the recommendations of his classification society has gone further and charged that the method of repair ABS used in the *Perama* was "dangerous" and "something the appellant knew or should have known" (A 48). How could petitioner, or any owner of a vessel classed with ABS, or with any foreign classification society, be held to know that a method of repair which its ABS classification society designed, recommended, supervised and approved, and was carried out by a reputable shipyard was dangerous. The standard of technical knowledge and expertise imposed on the shipowner is greater than that imposed upon ABS

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[13] 141 U.S. 638, 646 (1891).

[14] 317 U.S. 406, 412 (1943).

and the shipyard. This Court has not yet imposed such a burden.

The reasoning of the Court of Appeals would require a shipowner to engage independent experts, if they could be found, who knew more about ship repair and construction than did ABS, or any other classification society in which the vessel was classed. Further complications would then arise as to the degree of diligence acceptable in choosing such an expert. Obviously, this approach would render any action taken by a vessel owner in repairing or modifying his vessel, and, indeed, in constructing his vessel, subject to judicial review. It would create indefiniteness and indecision as to the applicable standard of due diligence, and would be a fertile breeding ground for litigation.

No officer of petitioner participated in the reactivation repairs which were recommended, supervised and approved by the American Bureau of Shipping. Nine reputable independent surveyors acted as petitioner's liaison with ABS and the repair yard (R. 490, 598, 1029-1034). Petitioner's president visited the shipyard on several occasions during the two and one-half-month repair period, but merely accepted, without qualification, the recommendation of his classification society, presumably competent persons (R. 497-498). If their work was faulty, which is denied, petitioner is entitled to limitation of liability.

Judge Dawson on the first trial held that " * * * While undoubtedly the respondent as owner of the vessel, knew about the welding and approved it, there was no proof that the loss of the vessel's cargo was done or occasioned by some default of which the owner was in privity for this would imply that the respondent knew that such welding made the ship unseaworthy. * * *" (A 13). Based upon the same facts, and with no additional evidence regarding the repairs introduced at the second trial, the Court of Appeals stated that the *Perama* was sent to sea in an unseaworthy condition because of petitioner's lack of due diligence (A 49).

We have found no case in which repairs such as were here made to the *Perama,* were so carefully planned, executed and supervised by a vessel's classification society, were approved by responsible experts, and yet the owner was denied exoneration, much less limitation, of liability. Further, we have found no case in which an independent surveyor's presence during repairs rendered him sufficiently high in the managerial hierarchy to constitute privity, barring limitation of liability.

Supposedly, the responsibility for exercising due diligence could not be delegated to others (A 47). We assume that in so stating, the Court of Appeals is speaking of ABS and Alabama, as "others", and attributes a lack of due diligence to the vessel owner by implying that the petitioner or its independent surveyor knew more about the correctness of the repairs than the American Bureau of Shipping, which is obviously not correct. However, the primary and basic ingredient is missing. What conduct on their part barred the defense of due diligence? Did they take some negligent step which resulted in the *Perama's* sinking, or did they fail to take some required precaution.

This Court in *Capital Transportation Co.* v. *Cambria Steel Co.*,[15] observed:

> "* * *. We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners * * *."

Ship owners and their insurers are entitled to rely on the limitation of liability statute and the decisions applying it, as recently referred to in *Petition of Kinsman Transit Company.*[16]

The present decision also attempts to obtain stature by implying (A 49) that two other circuits would support its

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[15] 249 U.S. 334 (1919).

[16] 338 F.2d 708, 715 (2d Cir. 1964).

holding that petitioner had knowledge and privity as a matter of law. This conclusion illustrates the conflict in interpretation of the statute between this Second Circuit decision and that of the Ninth Circuit in *States Steamship Company* v. *United States*,[17] and the Fourth Circuit in *W. R. Grace & Co.* v. *Charleston Lighterage & Transfer Co.*[18]

This Court has adopted an increasingly liberal interpretation as to what constitutes unseaworthiness in connection with seamen and longshoremen injury cases. See *Mahnich* v. *Southern S.S. Co.*;[19] *Seas Shipping Co.* v. *Sieracki*;[20] *Mitchell* v. *Trawler Racer, Inc.*;[21] *Michalic* v. *Cleveland Tankers, Inc.*;[22] *and Reed* v. *S.S. Yaka*.[23] However, it has not yet applied this insurer type burden to cargo losses covered by COGSA. The vessel owner theoretically still has the right to exoneration upon showing the exercise of due diligence to prevent unseaworthiness, even though unseaworthiness may be found to exist. The Court of Appeals decision herein bridged this gap without Congressional or Supreme Court authorization, and applied the personal injury insurer's burden of seaworthiness to a COGSA situation.

Until these statutes are revised by Congress, or abrogated by this Court, some uniformity in their interpretation is essential. The present decision violates all precedents.

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[17] 259 F.2d 458 (9th Cir. 1958).

[18] 193 F.2d 539 (4th Cir. 1952).

[19] 321 U.S. 96 (1944).

[20] 328 U.S. 85 (1946).

[21] 362 U.S. 539 (1960).

[22] 364 U.S. 325 (1960).

[23] 373 U.S. 410 (1963).

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 17, 1968.